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Supreme Court of the United States

OCTOBER TERM, 1967

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No. 436

LEO J. SCHLINSKY,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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LEO J. SCHLINSKY,
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UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Opinions Below

The opinion of the District Court (R. 77-82) is reported in 261 F. Supp. 265. The opinion of the Court of Appeals (Appendix A hereto) is not yet officially reported.

Jurisdiction

The judgment of the Court of Appeals sought to be reviewed (Appendix B hereto) was dated and entered on July 5, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Whether petitioner (whose trial commenced after the date of this Court's decision in *Miranda* v. *Arizona*, 384 U.S. 436), as the subject of a criminal investigation by the Internal Revenue Service, was entitled to be given the *Miranda* warnings by the Special Agents of the Internal Revenue Service who interviewed him and asked him for, and obtained, his books and records.

Petitioner believes that this is the first post-*Miranda* case to come before this Court, regarding the applicability of the principles of *Miranda* to a criminal tax fraud investigation, the trials in the three previous cases raising this point (*Kohatsu* v. *United States*, 351 F.2d 898 (C.A. 9), certiorari denied, 384 U.S. 1011; *Rickey* v. *United States*, 360 F.2d 32 (C.A. 9), certiorari denied, 385 U.S. 835; and *Thomas* v. *United States*, 370 F.2d 96 (C.A.), certiorari denied, 386 U.S. 975) having all commenced prior to the date of this Court's decision in *Miranda*. *Johnson* v. *New Jersey*, 384 U.S. 719, rehearing denied 385 U.S. 890.

2. Whether petitioner was entitled to be informed by the Special Agents that he was the subject of a criminal investigation.

3. Whether, in the light of this Court's decision in *Dennis* v. *United States*, 384 U.S. 855, it was unfair of the government not to have recorded the grand jury testimony of its key trial witness, the Internal Revenue Agent who had audited petitioner's returns, when (except for the grand

jury testimony of any other government investigatory agent who may have testified before the grand jury) the government recorded the grand jury testimony of all the other grand jury witnesses.

Constitutional Provisions and Statute Involved

The Fourth Amendment to the United States Constitution provides, in relevant part:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated. . . .

The Fifth Amendment to the United States Constitution provides, in relevant part:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . .

The Sixth Amendment to the United States Constitution provides, in relevant part:

> In all criminal prosecutions the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense.

26 U.S.C. 7201 provides:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon

conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

Statement

A. Proceedings Below

Petitioner was indicted of violating 26 U.S.C. 7201. The three-count indictment charged that petitioner willfully and knowingly attempted to evade and defeat a large part of his and his wife's income tax for the years 1958, 1959 and 1960, by knowingly understating his and his wife's taxable income for such years (R. 4-6). Petitioner pleaded not guilty (R. 1).

After a trial by jury, which commenced on November 15, 1966, petitioner was found guilty on all three counts (R. 82, 413). He was sentenced to five months' imprisonment and to pay a fine of $25,000 (R. 416).

An appeal was taken to the Court of Appeals, and on July 5, 1967, the Court of Appeals affirmed the judgment of the District Court.

B. Facts Material to Questions 1 and 2

Petitioner is, and for 28 years has been, a registered pharmacist. His educational background consists of three years, plus, of high school, and of attendance at the Boston School of Pharmacy (R. 317).

In 1939, at the age of 22, petitioner purchased a small drugstore in Easthampton, Massachusetts, which he owned until May, 1966. From 1939 to May, 1966 it constituted the principal source of his income. His other sources of income consisted of rents, dividends and savings bank interest (R. 318-319, 332).

Petitioner never had any accounting or bookkeeping courses and never did any bookkeeping, nor did he ever make out an income tax return, or any other type of tax return. The income tax audit which resulted in this action was his first audit (R. 318, 321-322).

That audit commenced on September 12, 1961 and ended in November, 1961, when Internal Revenue Agent Thomas F. Murphy, who had conducted the audit, referred the matter to the Intelligence Division of the Internal Revenue Service, as a potential fraud case (R. 17-18, 22-24, 27-30, 139).

Petitioner's last contact with any agent of the Internal Revenue Service during the civil phase of the government's investigation was had on November 7, 1961, when he was interviewed by Revenue Agent Murphy (R. 18, 22-24, 116, 139).

Petitioner's next contact with any agent of the Internal Revenue Service occurred almost six months later on April 24, 1962, at which time the government's investigation was in its criminal phase (R. 7-8, 37-38).

On that date, April 24, 1962, Special Agents Maurice Kirby and John Manning met petitioner in his store. Neither of the Special Agents had ever met or spoken to petitioner before, and the meeting was not prearranged. The Special Agents "just showed up" without any prior notice (R. 43-44, 78).

Special Agent Kirby showed petitioner his credentials and introduced himself and Special Agent Manning as Special Agents of the Intelligence Division, Internal Revenue Service. He did not tell petitioner what a Special Agent was, or what the Intelligence Division was (R. 47, 51).

Special Agent Kirby then advised petitioner that he need not answer any questions or produce any records he felt might incriminate him, and that he (Special Agent

Kirby) and Special Agent Manning would leave if told to go. No other warnings were given (R. 48-49, 52).

Petitioner thereupon asked Special Agent Kirby, "Where is [Revenue Agent] Murphy?", "What is this all about?" (R. 50).

In response, as Special Agent Kirby testified: "I told him that Mr. Murphy had referred the matter of his income tax return to us and that we were going to conduct a preliminary investigation of his tax liabilities." Special Agent Kirby did not tell petitioner that it was a "criminal investigation." And in interviewing petitioner, as was his "practice," Special Agent Kirby avoided the use of terminology such as "fraud," "crime," "criminal," "prosecute" and "fraudulent" (R. 48, 50-53).

In addition to interviewing petitioner, Special Agent Kirby obtained and took with him certain of petitioner's books and records, namely, petitioner's cash receipts and disbursements books and petitioner's bank statements, cancelled checks and checkbook stubs, all for the indictment years 1958, 1959 and 1960 (R. 8, 59).

The next day, April 25, 1962, Revenue Agent Murphy was assigned to work with the Intelligence Division, and the next time Special Agent Kirby went to see petitioner, on May 7, 1962, Revenue Agent Murphy — not Special Agent Manning — was with him. May 7, 1962 was the first time Revenue Agent Murphy had had any contact with petitioner since November 7, 1961 (R. 18, 22, 24, 28).

Special Agent Kirby testified that "It is very possible" that he and Revenue Agent Murphy "just arrived" at petitioner's store for the May meeting, as he and Special Agent Manning had in April (R. 62).

No warnings whatever were given at this meeting. Nor was the nature and purpose of the investigation revealed to petitioner (R. 62-63).

At the May meeting, too, petitioner gave the Agents the

records they requested, namely, his bank statements, cancelled checks, checkbooks and stubs for parts of the years 1956 and 1957 (R. 24, 59, 62).

At no time during these interviews was petitioner told that he was the subject of a criminal investigation, and at no time was he warned that anything he said or produced could be used as evidence against him in a court of law, or that he had the right to the assistance and presence of counsel. Yet, Special Agent Kirby admitted that the investigation of petitioner had been assigned to him "to find out whether or not [petitioner] had committed a criminal offense" (R. 38), and that one of the reasons for interviewing petitioner was to obtain "incriminating statements" (R. 38, 45).

Before his trial commenced, petitioner moved for an order suppressing, among other evidence, the evidence which had been obtained from him by the Special Agents in April and May, 1962, together with the fruits thereof (R. 6). A hearing was held and the motion was denied (R. 13-77). In its opinion, the District Court ruled (R. 80):

> . . . no rights of defendant Schlinsky were violated, under the decision of the Supreme Court in *Miranda* v. *Arizona*, 384 U.S. 436 (1966) or *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), it being clear that the defendant was at no time when interviewed at his own store in custody or otherwise deprived of his freedom in any significant way.

Thereafter, for purposes of the trial, petitioner and the government entered into a stipulation (R. 433-435) to the effect that for each of the indictment years petitioner's and his wife's taxable income was understated as alleged in the indictment. This stipulation was based on the evi-

dence petitioner sought to suppress, and it was, therefore, entered into subject to the express reservation (R. 435-438) that such stipulation was to be rendered null and void if it were determined on appeal that petitioner's motion to suppress should have been granted.

C. Facts Material to Question 3

Since the alleged understatements of taxable income were stipulated, the only issue before the jury was whether petitioner had acted willfully and knowingly.

The government's chief trial witness on this issue was Revenue Agent Murphy (see, Appendix A hereto, p. 8a).

At the conclusion of Revenue Agent Murphy's direct examination, petitioner, citing this Court's opinion in *Dennis* v. *United States*, 384 U.S. 855, moved for the production of Revenue Agent Murphy's grand jury testimony (R. 120). The government remained wholly silent, and the District Court denied petitioner's motion (R. 120-121). Petitioner then moved for an *in camera* inspection of such testimony by the District Court in order to determine whether there were any inconsistencies with Revenue Agent Murphy's testimony at trial (R. 121). Again, the government remained wholly silent, and again the District Court denied petitioner's motion (R. 121).

On the appeal to the Court of Appeals, the government disclosed for the first time that, in accordance with a long established policy of the United States Attorney, District of Massachusetts, the grand jury testimony of Revenue Agent Murphy had not been recorded (see Appendix A hereto, pp. 8a-9a, and a certain letter, dated May 16, 1967, from the United States Attorney, District of Massachusetts, to the Clerk of the Court of Appeals, Appendix C hereto). The Court of Appeals, noting that it does not accept statements in briefs "as evidence," remanded the

case to the District Court for a hearing on the matter (Appendix A hereto, p. 9a, and see, the original judgment of the Court of Appeals, dated June 6, 1967, petitioner's motion, dated June 13, 1967, to vacate such judgment, and the order of the Court of Appeals, dated June 15, 1967, vacating such judgment, Appendix D hereto).

The District Court held a hearing on June 28, 1967 (Appendix E hereto) and issued a Memorandum dated June 28, 1967 and an order dated June 30, 1967 (Appendix F hereto), to the effect that, although Revenue Agent Murphy had testified before the grand jury, no stenographic record of his testimony had been made. At the hearing, the Assistant United States Attorney who had presented the case to the grand jury, testified (Appendix E hereto, pp. 2e-3e) that:

> Except for the testimony of Government investigative agents, other testimony was reported and transcribed.

Argument

As to Question 1

The reported decisions on the question of the applicability of the principles of *Miranda* to a criminal tax fraud investigation (of which there appears to be an ever increasing number) are by no means uniform. While most of them hold that the type of warnings required by *Miranda* need not be given during a criminal tax fraud investigation, at least three District Courts have held otherwise (either on the basis of *Miranda* itself, or of this Court's earlier decision in *Escobedo* v. *Illinois*, 378 U.S. 478) and a fourth District Court and the Court of Appeals for the Sixth Circuit have expressed some doubts on the question.

The three District Court decisions holding otherwise are: *United States* v. *Schoenburg*, 19 AFTR 2d 347 (D. Ariz.) (not officially reported); *United States* v. *Kingry*, 19 AFTR 2d 762 (N.D. Fla.) (not officially reported); and *United States* v. *Turzynski*, 20 AFTR 2d 5004 (N.D. Ill.) (not officially reported). The last of these three decisions, *Turzynski*, was decided as recently as June 2, 1967.

The District Court opinion expressing some doubts is *United States* v. *Carlson*, 260 F. Supp. 423, 427 (E.D. N.Y.), where the Court noted:

> It is logically difficult to determine whether anything more is necessary to ripen the rights to the assistance of counsel and to a warning to that effect than the mere fact that the government is the interrogator in the perspective of criminal law enforcement, whether or not it has already resolved to go forward.

The Court of Appeals case in which doubt was expressed, *United States* v. *Maius*, 19 AFTR 2d 1712, 1715 (C.A. 6) (not yet officially reported), was decided less than two months ago on June 15, 1967. The Court of Appeals in that case remarked:

> . . . A doubt may well assail us as to whether it is fair to a citizen to be summoned before the Internal Revenue agents to be informed that anything he says may be used against him, and then for the agents of the Internal Revenue Service, personifying the authority and punitive nature inherent in the law enforcement, to subject a man to questioning and to extract possibly by threats, insinuations, or subtle forms of suggestive coercion, the only evidence on which he can be sent to prison, and to use this evidence to send him to prison. It would seem, in all

> fairness, that before he answers such questions and thereby directly incriminates himself, he should be advised of his right to have his lawyer present . . . . But whether fair or not, no court has held that a man who is not advised of his right to have his attorney present when questioned by an Internal Revenue agent, is thereby deprived of his constitutional rights. A citizen summoned before such federal agents has the option to refuse to answer their questions; but there are few who have the toughness of fibre and the technical knowledge of their rights, who would decline to answer questions put to them in these circumstances. Until we are told by superior authority that a citizen's constitutional rights are imperiled by such procedure, we are constrained to hold that the evidence thereby obtained is admissible in the ensuing criminal trial.

Significantly, it would appear that the procedure of the Internal Revenue Service itself has just changed. In a speech delivered June 8, 1967, the Chief Counsel, United States Treasury Department, Internal Revenue Service, while disclaiming that the Service was required to do so, stated that Special Agents have recently been instructed to the following effect (Appendix G hereto):

> . . . at the outset of his initial interview with the subject of an investigation, a Special Agent of the Intelligence Division will produce his authorized credentials and state: "As a Special Agent, I have the function of investigating the possibility of criminal tax fraud." Thereafter, should the stage be reached where the possibility of criminal tax fraud has been sufficiently indicated to warrant a full scale investigation, the Special Agent must advise the subject on

contact of his constitutional rights to remain silent and to retain counsel.

The investigation of petitioner became a "full scale investigation" on February 8, 1962 (R. 41-42), two and one-half months before petitioner was first interviewed by the Special Agents. Thus, under the new instruction of the Internal Revenue Service, petitioner would have been entitled to the type of warnings required by *Miranda*.[1]

It is petitioner's contention that the Internal Revenue Service's new procedure is but a reflection of what is Constitutionally required of the government in order to safeguard the Fifth Amendment privilege against self-incrimination. Not only is a suspected tax evader in the position of an accused from the very moment a Special Agent's investigation begins, but at the critical time of the interview by the Special Agent, although the taxpayer is not ordinarily in "custody" in the usual sense of the word, he is in a "setting" which is "likely to exert such pressure upon the individual as to disable him from making a free and rational choice" (384 U.S. at 464-465).

As noted in a recent article by Paul P. Lipton, *Constitutional Rights in Criminal Tax Investigations*, 53 ABA Journal 517:

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[1] The limited warnings petitioner was given did not include either the warning that anything he said or produced could be used against him in a court of law, or — most important of all — the warning of his Sixth Amendment right to the presence and assistance of counsel. Even the limited warnings which he was given were not meaningful, the Special Agents having represented to him, at the time they gave him these limited warnings, that they were conducting a "preliminary investigation" (R. 50-51). There was no indication that their purpose was to investigate the possibility of criminal tax fraud. Indeed, the Special Agents took pains to avoid giving petitioner any such indication (R. 48, 50-53).

> . . . Coercion . . . is inherent in all official questioning. During a tax investigation, the psychological pressures and mistaken beliefs inducing sacrifice of constitutional rights are as significant as the compelling influences inherent in custodial interrogation.

As to Question 2

Apart from the question of the applicability of the principles of *Miranda*, it is petitioner's contention that it cannot be said as a matter of law, as did the Courts below (R. 80 and Appendix A hereto, p. 5a), that petitioner acted voluntarily in his dealings with the Special Agents, when he did not know and was not informed that he was the subject of a criminal investigation.

Petitioner acted voluntarily only in the sense that he acted without any physical coersion and (it is assumed solely for purposes of this question 2) without any psychological coercion such as that existing in custodial situations. But he did not act voluntarily in the sense of acting knowingly and intelligently, and there cannot be any waiver of constitutional rights unless the same is done knowingly and intelligently, as well as without physical or psychological coercion. See, *Johnson* v. *Zerbst*, 304 U.S. 458, 464; and *Miranda*, 384 U.S. at 444.

Petitioner contends that when the government sought his consent to what, in effect, was a warrantless search and to be a witness against himself, the Fourth and Fifth Amendments required the government to apprise him of the fact that he was the subject of a criminal investigation.[2]

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[2] The government must also avoid acting so as to obscure the potential scope of the inquiry. In *United States* v. *Como*, 340 F.2d 891, 894 (C.A. 2), a case involving a search and seizure of narcotics, the Court held that the defendant had not intelligently waived his Consti-

An express holding by this Court, that the Fourth and Fifth Amendments require that every taxpayer under criminal investigation be informed of that fact before being questioned or asked for his books and records, would also avoid the problem which troubled the Court of Appeals in *United States* v. *Spomar*, 339 F.2d 941, 943 (C.A. 7), certiorari denied, 380 U.S. 975, rehearing denied, 381 U.S. 956, namely, that a test of voluntariness based on a suspect's knowledge would result in the government's being bound by the suspect's "subjective state of mind which is not subject of proof." As this Court stated in *Miranda*, in addressing itself to a similar problem (384 U.S. at 468-469):

> The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clearcut fact.

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tutional rights because the government agents had "camouflaged their purpose of investigating Como's personal criminal liability." In petitioner's case, too, there appears to have been some such camouflage. Special Agent Kirby not only failed directly to answer petitioner's questions, "Where is [Revenue Agent] Murphy?" and "What is this all about?", but told petitioner that he was going to conduct a "preliminary investigation" and avoided the use of terminology such as "fraud," "crime," "criminal," "prosecute" and "fraudulent" (R. 48, 50-53). Further, on the day after petitioner asked where Revenue Agent Murphy was, the government assigned Revenue Agent Murphy to work with Special Agent Kirby on the matter, and when Special Agent Kirby next visited petitioner he was accompanied by Revenue Agent Murphy (R. 18, 22, 24, 28).

A mandatory statement as to the nature and purpose of a Special Agent's investigation (similar to the statement the Internal Revenue Service has just elected to instruct its Special Agents to give; Appendix G hereto) would likewise be a "clearcut fact."

As to Question 3

The holding of the Court of Appeals in this case, that petitioner's Constitutional right to due process of law under the Fifth Amendment was not violated by the government's failure to record Revenue Agent Murphy's grand jury testimony (Appendix A hereto, pp. 8a-9a), appears to be in direct conflict with the decision of the Court of Appeals for the Ninth Circuit in *Lenske* v. *United States,* 18 AFTR 5815 (C.A. 9) (not yet officially reported).[3]

In *Lenske,* as in petitioner's case, the government failed to record the grand jury testimony of its principal witness; in *Lenske,* as in petitioner's case, that witness was a government investigatory agent; in *Lenske,* as in petitioner's case, the grand jury testimony of the agent was sought for purposes of cross-examination; in *Lenske,* as in petitioner's case, the government, while not recording the grand jury testimony of the agent, did record the grand jury testimony of other grand jury witnesses.

The only difference between the two cases is in their holdings.

In petitioner's case, while frowning on what the government had done (Appendix A hereto, p. 9a), the Court below held that the government had not acted unfairly.[4]

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[3] The *Lenske* case was brought to the attention of the Court below before it rendered its judgment (Appendix C hereto).

[4] The Courts of Appeals for the Second and Sixth Circuits have also frowned on a related situation, where the government did not record the grand jury testimony of any grand jury witness. In both cases, while refusing to hold that it was a Constitutional requirement, the

In *Lenske*, on the other hand, the Court of Appeals for the Ninth Circuit held that the government had acted unfairly, stating (18 AFTR at 5822) that the "incident" seemed to it "particularly offensive," and that:

> Whether government counsel meant that no shorthand notes had been made of the Special Agent's Grand Jury testimony, or that such notes were taken and had not been typed up, it is evident that the Government so arranged matters that there would be available transcripts by which neutral witnesses could be held to their Grand Jury testimony and checked if they varied from it, while as to government partisan witnesses, who presented no danger of their being swayed from their recitals, there would be no writing which the taxpayer might use for cross-examination. It was a clever scheme, but one-sided and unfair, and in complete violation of the teachings of *Holland* v. *United States, supra.*

In addition to being in conflict with *Lenske*, the decision of the Court below opens the door to an emasculation of this Court's decision in *Dennis* v. *United States*, 384 U.S. 855.[5]

Courts of Appeals stated that it would be "better procedure" to transcribe grand jury testimony. *United States* v. *Cianchetti*, 315 F.2d 584, 591 (C.A. 2) and *United States* v. *Hensley*, 374 F.2d 341, 352 (C.A. 6). Professor Moore is of the opinion that, in "[f]airness to the defendant"; grand jury testimony should be transcribed verbatim, "particularly in view of the use of the [grand jury] minutes for purposes of impeachment, assuming there are inconsistencies with the witness's trial testimony." 8 Moore, *Federal Practice, Rules of Criminal Procedure* (2d ed.) at pp. 6-10—6-11.

[5] Preliminarily, before ruling that the government had not acted unfairly, the Court below held that petitioner had successfully demonstrated a "particularized need" under *Dennis* and that, if Revenue Agent Murphy's grand jury testimony had been recorded, petitioner would have been entitled to it for use in cross-examination (Appendix A hereto, p. 8a).

The underlying principle of *Dennis* is that grand jury testimony, when used for purposes of impeachment, is a vital tool in the search for truth and one which may be invaluable in furthering the accused's defense. Under the decision of the Court below, however, this vital tool can easily be denied a defendant simply by the government's not recording any grand jury testimony.

The decision below also gives the government the opportunity to pick and choose whose grand jury testimony should be recorded and whose should not, thereby permitting the government to insulate certain of its witnesses from what might otherwise be a fuller, more complete and more meaningful cross-examination, while making sure that other of its witnesses will be held to their grand jury testimony.

Conclusion

The questions presented by this petition concern basic Constitutional rights, as to which not only persons suspected and accused of crimes, but the Courts and certain agencies of the government, such as the Internal Revenue Service and the Department of Justice, need the guidance of this Court.

The first question, regarding the applicability of the principles of *Miranda* to a criminal tax fraud investigation, apart from being one as to which there are conflicts among some of the Courts below, is recurring. The ever growing number of reported opinions on the question speaks for itself.

The second question, whether a taxpayer who is the subject of a criminal investigation is entitled to be so informed before being questioned and asked for his books and records by government agents, is one as to which the Internal Revenue Service itself has just changed its policy.

The third question, regarding the government's practice of not recording the grand jury testimony of certain witnesses, presents a conflict between the Court of Appeals for the First Circuit and the Court of Appeals for the Ninth Circuit, which conflict only this Court can resolve.

Petitioner, therefore, respectfully urges this Court to grant the instant petition.

July 28, 1967

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 6864.

LEO J. SCHLINSKY,
DEFENDANT, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
MCENTEE and COFFIN, *Circuit Judges*.

Jerome Gotkin, with whom *Benjamin Arac*, *David M. Scheffer*, *Stephen M. Honig* and *Widett & Kruger* were on brief, for appellant.
Herbert N. Goodwin, Assistant U. S. Attorney, with whom *Paul F. Markham*, United States Attorney, was on brief, for appellee.

June 6, 1967.

ALDRICH, *Chief Judge*. Defendant appeals from his conviction, following a jury trial, of willful evasion of income tax for the years 1958, 1959, and 1960. 1954 I.R.C. § 7201. Defendant was the sole proprietor, and principal operator, of a drug store. His returns were prepared by an accountant named Warrick. Warrick did not audit or, with one exception, examine any of defendant's books, but simply took the figures given him by defendant and, for a charge of $55, prepared the return. The book which defendant did supply contained the receipts from defendant's regular sales, but did not contain the receipts from his "accomodation," or no-profit sales. Defendant retained a notebook,

described by him as a "personal memorandum," that showed both. He destroyed this after Warrick told him that the Internal Revenue Service audit of his returns was revealing substantial discrepancies.[1]

The discrepancies were in fact substantial. It was stipulated at the trial that defendant's net taxable income for the three years, totaling approximately $117,000, was understated by some $37,000, or more than 30%, and that savings bank interest of almost $10,000 was 50% underreported. Defendant avoided cross-examination upon what might be thought sizable inadequacies on the face of the returns by testifying that he never looked at them. His explanation, while lengthier than this, amounted to little more than that he trusted Warrick.

Defendant testified that the book supplied to Warrick contained proprietorship accounts showing how much money he was taking out of the business. He now contends that since these figures reflected his true income, an inference of good faith should be drawn. In fact, however, these accounts accurately reflected neither his income from the pharmacy nor his total income from all sources. It was pure coincidence that the total corresponded closely with what was eventually stipulated to be his true income. The jury was not required to conclude good faith from this. It is true that Warrick might have learned from these figures that defendant was extracting from the business more than it was earning, but, assuming he did so, Warrick was not retained either to investigate, or to evaluate, defendant's business judgment. If the jury disbelieved defendant's statement that he never looked at his returns, as well it might, but credited his testimony that he attached "bibli-

[1] Defendant also, on advice of counsel, purchased for $1 from Warrick certain work sheets. While the evidence is in dispute what sheets were involved, we disagree with defendant that it was error to admit testimony of the purchase.

cal" importance to the proprietorship figures, it could conclude that rather than trusting Warrick's results to be accurate defendant was well aware that they were not.

Before trial defendant filed what district judges are now finding almost inevitable, a motion to dismiss and a motion to suppress. The former, based on a delay in the return of the indictment, asserted a denial of his Sixth Amendment right to a speedy trial. The investigation began in the late summer of 1961, and the indictment was returned in January 1965. The defendant was interviewed by IRS personnel in April and May of 1962. In May his attorney registered his appearance with the IRS. In February 1964 defendant was interviewed again, and in March the Service formally advised him of the possibility of criminal proceedings. Defendant does not complain of the ten months delay after March 1964 because during that period his counsel were seeking to head off any indictment. Nor does he make any showing that any delay prior to March caused him actual prejudice, or was improperly motivated. *Cf. United States* v. *Ewell*, 1966, 383 U.S. 116, 122-23. We do not agree with the defendant that the burden was on the government to "explain."

It has generally been held that the right to a speedy trial does not attach prior to indictment. *E.g., Nickens* v. *United States*, D.C.Cir., 1963, 323 F.2d 808, *cert. den.* 379 U.S. 905; *Foley* v. *United States*, 8 Cir., 1961, 290 F.2d 562, *cert. den.* 368 U.S. 888; *Hoopengarner* v. *United States*, 6 Cir., 1959, 270 F.2d 465. As the Supreme Court has stated in a somewhat different context, "There is no constitutional right to be arrested." *United States* v. *Hoffa*, 1966, 385 U.S. 293, 310. While we are not prepared to hold categorically that the statute of limitations is the only control on the length of time permissible between the conclusion of the government's investigation of a crime and the bringing of an indictment, *cf. Ross* v. *United States*, D.C.Cir., 1965, 349

F.2d 210, we do hold that a claim of unconstitutional pre-indictment delay must be supported by something much more than appears in the present case.

The motion to suppress was directed to records that the defendant had supplied to IRS agents and other evidence obtained as "fruit" of examination of those records. This motion was properly denied. The court found that in the initial civil audit no warnings were given to the defendant. However, when the possibility of criminal liability appeared, the case was turned over to a Special Agent who, at his first meeting with the defendant, advised him that he need not answer any questions, that he need not produce any records that might incriminate him, and that he could terminate the interview at any time.[2] All interviews were conducted on defendant's premises. It is not contended that there was any physical restraint, threats or promises.

The relation between a taxpayer's obligation to supply information to taxing authorities and his Fifth Amendment privilege is a complex and unsettled one. Every person is required to maintain records of all financial dealings that bear on his tax liability, 1954 I.R.C. § 6001 and Treas. Reg. 1-6001-1(a), and under some circumstances he may be required to produce them. 1954 I.R.C. § 7602. To what extent the "required records doctrine" of *Shapiro* v. *United States*, 1948, 335 U.S. 1, which denies the privilege to records that the law properly requires certain classes of persons to keep, is applicable to tax records is uncertain. See generally Meltzer, The Privilege Against Self-Incrimination and Required Income Tax Records, 30 Taxes 45 (1952). We may assume for present purposes, however, that personal records, even though discoverable for civil purposes, may be withheld by a defendant in a criminal case. See

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[2] Nothing was said about a right to counsel. There was no requirement that this be done. *Morgan* v. *United States*, 1 Cir., 5/16/67, F.2d ; *Salinger* v. *Bigler*, 9 Cir., 4/27/67, F.2d .

Scanlon v. *United States*, 1 Cir., 1955, 223 F.2d 382; *cf. United States* v. *Blue*, 1966, 384 U.S. 251. The court's finding, however, that defendant's actions were voluntary in fact was manifestly correct. It is apparent that defendant produced what he wanted, and retained what he wanted. The motions were properly denied. 261 F.Supp. 265.

At the trial the defendant unsuccessfully sought a lengthy voir dire of prospective jurors. The court's limitation was within its discretion. Principally what it excluded were questions purportedly designed to discover whether the juror would accept various instructions of law favorable to the defendant that might be expected to be in the charge. We have long viewed with disfavor the practice prevailing in certain jurisdictions under which a party, ostensibly engaged in exploring the jury's qualifications, is in fact exercising hopefully sophisticated advocacy upon jurors whom it has no real intention of challenging. See *Strickland* v. *Perry*, 5 Cir., 1957, 244 F.2d 24, *cert. den.* 355 U.S. 847, disapproving. This not only corrupts the purpose of the voir dire, but places undue emphasis upon those points the party so chooses to make.

With respect to the other inquiries which the court precluded, in our opinion the purpose of the voir dire is to ascertain disqualifications, not to afford individual analysis in depth to permit a party to choose a jury that fits into some mold that he believes appropriate for his case. Even if a party has some special matter in mind, a broad discretion as to its appropriateness must be reposed in the district court. *Stephan* v. *Marlin Firearms Co.*, 2 Cir., 1965, 353 F.2d 819, *cert. den.* 384 U.S. 959; *United States* v. *Mackey*, 7 Cir., 1965, 345 F.2d 499, *cert. den.* 382 U.S. 824; *Sellers* v. *United States*, D.C.Cir., 1960, 271 F.2d 475.

Next, we find entirely without merit defendant's extensive argument that the evidence did not warrant conviction. Even if, which we in no way grant, all of the damaging

testimony for which the witness Warrick is criticized were to be disregarded, there was ample evidence to support a conviction. We recognize that counsel are, and should be, zealous advocates, and that guilty as well as innocent defendants are entitled to full representation. We have said before, however, *Stack* v. *United States*, 1 Cir., 1966, 368 F.2d 788, 790, *cf. White* v. *Hancock*, 1 Cir., 1966, 355 F.2d 262, 263 n.2, and we repeat, that full representation does not include the making of points which are clearly frivolous. *Cf. Anders* v. *California*, 5/8/67, . . . U.S. . . . . We so regard this one. Even today, defendant has been unable to suggest a reason, other than that he never studied bookkeeping, why a man capable of running his own business for twenty-two years, a business grossing well over $100,000 annually by the time in question, could think that he should not account either in gross receipts or elsewhere, for the proceeds of substantial sales just because they were made at cost. Other matters, independently causing us to believe defendant's motion for acquittal frivolous, we will not pause to discuss.

Only a few of defendant's evidentiary complaints require consideration. Warrick testified that defendant gave him, each year, his total savings bank interest. Defendant testified that he gave Warrick the amounts he had on deposit, and the rates of interest each bank paid, and that Warrick calculated the interest. Why defendant should adopt so complicated a procedure, let alone how he could innocently have given figures causing a 50% understatement, was never explained. Nonetheless, we will assume that defendant was entitled to prove his version to the limit.

In 1962, because of his tax difficulties, defendant employed an accountant, one Myers. Myers conferred with Warrick, following which an affidavit was prepared, apparently by Myers, which he asked Warrick to sign. Warrick refused. Defendant made three unsuccessful attempts

to introduce this paper in evidence. The court was clearly correct as to two. There is a considerable burden to show adoption of a statement or document prepared by someone else. The mere assertion of one reason or excuse for not signing is not to be equated with waiver, or taken as an acknowledgement that there was no other reason. Warrick's saying that he wanted to consult counsel, and, on another occasion, referring to one specific error, was not to be construed as even partial adoption. Finally, whether or not Myer's proposed testimony showed a more specific adoption, *cf. Asaro* v. *Parisi*, 1 Cir., 1962, 297 F.2d 859, it was not prejudicial error to exclude it. Myers had already testified that Warrick told him everything that was in the affidavit. For Myers to say that Warrick thereafter confirmed it would have added nothing of substance.

With respect to the nonexistence of Form 1099 on which savings banks are now required to report interest, 26 U.S.C. § 6049(c) (1962), conceivably it might have been better under the circumstances of this case if the court had reminded the jury that in the years in question this form had not been devised. However, we find no error. Defendant's backing and filling never succeeded in articulating exactly what he wanted to prove with respect to Form 1099, or what he expected this proof to demonstrate. At least most of the time he substantially overstated its legal consequences and relevancy, which quite apparently caused the court to conclude that the slight possible relevancy was more than overshadowed by the confusion it might cause the jury.

The defendant makes a number of complaints about the charge, none of which we sustain. The court instructed the jury that accident or carelessness was not willful intent. Defendant requested that the court add "gross" carelessness. While to have done so would not have been error, see *Gaunt* v. *United States*, 1 Cir., 1950, 184 F.2d 284, *cert. den.*

340 U.S. 917, the court might properly feel (as it said it did) that it would then have to define gross carelessness. It would not be improper for a court to suggest that, if carelessness appeared sufficiently gross, there might come a time when the jury might ask itself if the defendant was truly careless, or something worse. We hold that it was not error for the court to simplify the matter, as it did, *in limine*.

It is true that in another connection there was one sentence in the charge, which the court apparently took out of a compendium of nationally published charges, and which, standing alone, was possibly misleading.[3] However, there were other statements which were full and correct. The defendant did not call the court's attention to the possible inconsistency. This is the classic situation where a defendant cannot invoke the "plain error" rule. *E.g., Conley* v. *United States*, 6 Cir., 1958, 257 F.2d 141; *cf. Dichner* v. *United States*, 1 Cir., 1965, 348 F.2d 167.

There is one matter on which we do agree with the defendant. The witness Murphy, the original IRS agent, gave very damaging evidence against the defendant. The defendant called for his grand jury testimony for use in cross-examination. Without hearing argument, the court refused. Under certain earlier cases decided by this court and others, this ruling was proper. Under *Dennis* v. *United States*, 1966, 384 U.S. 855, we believe it was not. In the light of that opinion the requirement of "particularized need" is very easily met. Here, as in *Dennis*, it was for cross-examination.[4] However, the government now informs us, by brief, that the "long established policy of the United States Attorney's Office, District of Massachusetts, [is]

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[3] We have more than once had occasion to regret the publication of charges that exceed routine "boiler-plate" because of just this danger.

[4] But *cf. Walsh* v. *United States*, 1 Cir., 1967, 371 F.2d 436, to which we adhere.

not to record the Grand Jury testimony of Government employees.'[5] The defendant's contention that this is an unconstitutional practice in the light of *Dennis* is without merit. *McCaffrey* v. *United States*, 10 Cir., 1967, 372 F.2d 482. Whether, under our supervisory power, *cf. Mallory* v. *United States*, 1957, 354 U.S. 449, we should now, in the light of *Dennis*, condemn it for the future, is not presented, and in view of the lack of argument on the subject we will not decide it. Possibly the United States Attorney will voluntarily reconsider this practice, if it be his practice.

We added the last five words, and we remand the case, for precisely the same reason. We do not accept statements in briefs as evidence. If the district court finds, after hearing, that the grand jury testimony of Murphy was not taken, the judgments will be affirmed. If the testimony was taken, defendant will be entitled to a new trial unless there appears no slightest inconsistency between Murphy's grand jury testimony and his testimony at the trial.[6]

The case is remanded to the district court for further proceedings consistent herewith.

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[5] The government, after argument, reduced this to mean "Government investigative agents," because such individuals file "reports." The government added that these reports "are available to the defendant under the Jencks Act." We note this for what little it is worth, at the same time observing that the government disclaimed at the trial having any such report from Murphy.

[6] We recognize that this ruling falls somewhat short of certain statements in *Dennis*. See 384 U.S. at 873-75. However, Murphy was extensively cross-examined, and at this stage of the case we would find no prejudicial error if his grand jury testimony suggested no inconsistency whatever.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6864.

LEO J. SCHLINSKY,
Defendant, Appellant,
v.
UNITED STATES OF AMERICA,
Appellee.

JUDGMENT

July 5, 1967.

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, an opinion of the Court was filed on June 6, 1967, and an order was entered on June 15, 1967, remanding the case to said District Court for further proceedings consistent with said opinion.

Upon receipt of the memorandum of the District Court dated June 28, 1967, and the order dated June 30, 1967, in accordance with the opinion of this Court dated June 6, 1967,

The judgment of the District Court is affirmed.

By the Court:
/s/ ROGER A. STINCHFIELD
Clerk

[cc. Messrs. Gotkin and Goodwin.]

APPENDIX C

[LETTERHEAD — UNITED STATES ATTORNEY
DISTRICT OF MASSACHUSETTS]

May 16, 1967

Mr. Roger A. Stinchfield, Clerk
United States Court of Appeals
U. S. Post Office and Courthouse Building
Room 1602
Boston, Massachusetts 02109

Dear Mr. Stinchfield:

Re: *Schlinsky* v. *U. S. of A.* — *C.A. 1st* — *No. 6864*

In Footnote 2, page 11, of Appellee's Brief, as well as in oral argument, counsel for the Government stated that it has been a long established policy of the United States Attorney, District of Massachusetts, not to record the Grand Jury testimony of "Government employees".

We believe, upon reflection, that the phrase "Government employees" is a bit too inclusive and apt, therefore, to mislead the Court. The policy, in fact, has been not to record the testimony of Government investigative agents only for the reason that the reports of these agents, which are at all times available to the United States Attorney, normally contain the substance of their testimony before the Grand Jury. Moreover, substantial portions of these reports are available to the defendant under the Jenks Act should the Government agent testify.

Two cases brought to our notice since oral argument and which we believe should be called to the Court's at-

tention are (1) *Lenske* v. *United States,* 66-2 U.S.T.C., par. 9686 (9 Cir. 1966) petition for rehearing *en banc* filed November 23, 1966 and still pending, which contains language contrary to the Government's position that it is not required to record Grand Jury testimony; and (2) *Selinger* v. *Bigler,* (9 Cir., April 27, 1967) in which the Ninth Circuit reaffirmed its earlier decision in *Kohatsu* v. *United States,* 351 F.2d 898.

Very truly yours,
PAUL F. MARKHAM
United States Attorney
By /s/ HERBERT N. GOODWIN
HERBERT N. GOODWIN
Assistant U. S. Attorney

cc:
Jerome Gotkin, Esquire
of Widett & Kruger

APPENDIX D

JUDGMENT

June 6, 1967.

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The case is remanded to the District Court for further proceedings consistent with the opinion filed today.

By the Court:

/s/ ROGER A. STINCHFIELD

Clerk

[cc. Messrs. Gotkin and Goodwin.]

MOTION OF APPELLANT TO VACATE JUDGMENT DATED AND ENTERED JUNE 6, 1967 AND TO MAKE AN ORDER IN LIEU THEREOF

Now comes Leo Schlinsky, appellant in the above-entitled case, and moves that the judgment herein dated and entered June 6, 1967 be vacated and that an order be made providing for a partial remand to the District Court for further proceedings consistent with the opinion of this Court dated June 6, 1967, for the District Court to report back to this Court upon the conclusion of such further proceedings and for this Court thereupon to enter the appropriate judgment herein.

The reason appellant is making this motion is that appellant otherwise is faced with the following dilemma: Appellant intends to file a petition in the Supreme Court of the United States for a Writ of Certiorari and intends to present in such Writ the question whether the failure

of the Government to record the Grand Jury testimony of Revenue Agent Murphy in the within case, if such be the fact, constituted a denial of Due Process under the Fifth Amendment. The determination of whether or not a record of Agent Murphy's Grand Jury testimony exists, therefore, would appear to be an essential prerequisite to the presentation of such question and to action by the Supreme Court on it, because if such record does exist, the question proposed to be presented by appellant would be moot. Yet, the District Court might not be able to make the required finding before appellant's time to petition the Supreme Court expires (which time runs from last Tuesday, June 6, 1967), or even before the Supreme Court acts.

Appellant, therefore, respectfully requests that that judgment be vacated and that an order be made as aforesaid, in order to resolve such dilemma.

Respectfully submitted,
WIDETT & KRUGER
By /s/ JEROME GOTKIN
JEROME GOTKIN
Attorney for Defendant-Appellant
80 Federal Street
Boston, Massachusetts

ORDER OF COURT

June 15, 1967.

Upon motion of appellant, and without objection,

It is ordered that the judgment herein dated June 6, 1967, be, and the same hereby is, vacated; and further

It is ordered that this case be, and the same hereby is, remanded to the District Court for further proceedings.

consistent with the opinion of this Court of June 6, 1967, and said District Court shall report back to this Court upon the conclusion of such further proceedings, whereupon this Court will enter an appropriate judgment.

By the Court:

/s/ ROGER A. STINCHFIELD

Clerk

[Cert. cc: Clerk, U.S.D.C., Mass., with certified copy of opinion of June 6, 1967, and the original record on appeal which is to be returned to this Court upon report back; and cc: Messrs. Gotkin and Goodwin.]

APPENDIX E

STENOGRAPHIC TRANSCRIPT OF PROCEEDINGS ON REMAND

[1]

Courtroom No. 1
U. S. Post Office and Court House
Boston, Massachusetts
June 28, 1967

Mr. Gotkin: Mr. Goodwin said he would be right up; he just went downstairs, to his office. While waiting, I will thank you for the rescheduling.

The Court: All right.

Mr. Goodwin: Your Honor, this matter is before the court this morning, as you know, in order to determine whether the testimony of Revenue Agent Murphy was taken before the grand jury.

Before beginning, I would like to state on the record, I have examined the files and books of the United States Attorney's Office; I have spoken to the former Assistant who handled this case; I have spoken to the reporter assigned to this case as well as Mr. Elliott of the firm, which is our contract firm. I have spoken to Miss Ferrigno, Administrative Assistant—

The Court: What was that name, again?

Mr. Goodwin: Miss Ferrigno. On the basis of the examination and conversations, I should at this time like to represent to the court, that the grand jury testimony [2] of Revenue Agent Murphy was neither recorded or transcribed, there being no reporter present at that time. We do have a witness. We can proceed.

The Court: Go ahead.

MURRAY FALK, Sworn

Direct Examination

Q. (By Mr. Goodwin) May I have your name, sir? A. Murray Falk.

Q. Your occupation? A. I am an attorney.

Q. With whom are you affiliated? A. A member of the firm of Moulton, Looney, Mazzone and Falk.

Q. Where were you employed before then? A. I was Assistant United States Attorney in the office of the United States Attorney, for the District of Massachusetts.

Q. Tell me, sir, did there come a time in the course of your duties as Assistant United States Attorney, when you presented evidence to the grand jury, in the case of United States vs. Schlinsky? A. There did, sir, yes.

[3] Q. Do you recall approximately when that was? A. Yes, it was at the end of 1964, I believe, December, 1964, January, 1965.

Q. Will you tell me, sir, in the course of presenting evidence to the grand jury in the matter of United States vs. Schlinsky, did you interrogate Revenue Agent Thomas Murphy? A. Yes.

Q. Will you tell us, Mr. Falk, if you know, whether or not there was a reporter present when Mr. Murphy testified? A. There was no reporter present.

Mr. Goodwin: Thank you, no further questions.

Cross Examination

XQ. (By Mr. Gotkin) Mr. Falk, was there a reporter present when the other witnesses before the grand jury testified?

Mr. Goodwin: Objection, it is irrelevant to this proceeding.

The Court: I will let him answer that, one question.

The Witness: Except for the testimony of Government

investigative agents, other testimony was reported and transcribed.

[4] Mr. Gotkin: No further questions.

The Court: All right, you are excused, Mr. Falk, thank you.

Mr. Goodwin: I would like to call Robert J. Elliott.

ROBERT J. ELLIOTT, Sworn

Direct Examination

Q. (By Mr. Goodwin) Your name, sir. A. Robert J. Elliott.

Q. Your address? A. 8 Whittier Place, Boston.

Q. Tell me your occupation. A. I am in the court reporting business.

Q. With whom are you affiliated? A. The firm of Manoogian and Elliott.

Q. Are you the Elliott? A. Yes.

Q. You are part owner of the firm? A. That is right.

[5] Q. You are here today in response to a subpoena? A. Yes.

Q. That subpoena asks you to bring in the documents and records with you? A. Yes, it did.

Q. Do you have those? A. I have two diaries.

Mr. Goodwin: I would like to have this marked as Government's Exhibit 1 for identification.

(Records of Witness Elliott marked Government's Exhibit 1 for identification.)

Q. Sir, can you tell me if you know what this document is? A. Yes. This is the Department of Justice contract that we had in the fiscal year—

The Court: I don't think there is any question, he had the contract.

Mr. Gotkin: I don't see where it is relevant.

The Court: This is a contract he had, to take testimony.

Q. Did there come a time as part owner in the firm of

Manoogian and Elliott, you assigned a reporter to record proceedings before a grand jury in the case of [6] United States vs. Schlinsky? A. Yes.

Q. Approximately what date? A. December 28 or 29 of 1964.

Q. Tell me the name of the reporter. A. Yes. The name of the reporter was Ruth Chiarino.

Q. Was there anyone else assigned from your office to take testimony, except Miss Chiarino? A. In that particular case, no.

Mr. Goodwin: I have nothing further.

Mr. Gotkin: No questions.

The Court: Thank you, Mr. Elliott, you are excused.

RUTH G. CHIARINO, Sworn

Direct Examination

Q. (By Mr. Goodwin) Miss Ruth Chiarino, please. Tell me your name, please. A. Ruth G. Chiarino.

Q. Do you recall, Mam, that you were the one assigned by Mr. Elliott to take court proceedings in the grand jury in the case of United States vs. Schlinsky? A. Yes, sir.

[7] Q. You are here today in response to a subpoena? A. Yes.

Q. The subpoena asked you to bring certain records and documents with you? A. Yes.

Q. Did you bring them? A. Yes, I did.

Q. Will you tell us what these are? A. These are the stenotype notes taken in the case of United States vs. Schlinsky on Tuesday, December 29, 1964 and Tuesday, January 5, 1965.

Q. Have you reviewed these notes? A. Yes, I have.

Q. You looked at them? A. Yes.

Q. Do you know, Mam, can you tell us if the testimony of Revenue Agent Murphy was recorded by you? A. It was not.

Mr. Gotkin: I object to the question. I will withdraw the objection.

(The question and answer were read.)

Q. Is the testimony of Revenue Agent Murphy included in your notes? A. No, it is not.

Mr. Goodwin: I have no further questions.

[8] *Cross Examination*

XQ. (By Mr. Gotkin) Do your notes include the testimony of other witnesses before that grand jury? A. Yes, they do.

XQ. Is Revenue Agent Murphy the only witness whose testimony you do not have a record of?

Mr. Goodwin: I object to that, as not being relevant to the purpose of this proceeding.

The Court: If she knows, she can answer.

The Witness: His testimony was not taken on the days of Tuesday, December 29, 1964 and Tuesday, January 5, 1965.

XQ. You do not know whether it was taken on any other day, is that what you are saying? A. I was here these two days, these are the only days I can testify to.

XQ. As to those two days, did you take the testimony of all witnesses other than Agent Murphy?

Mr. Goodwin: Again, I object to it.

Mr. Gotkin: I believe it is the same question I asked before.

The Court: I will hear the answer.

[9] A. I took the testimony of all witnesses who appeared on those two days. The witness you are asking about is not in my notes. I did not take his testimony.

XQ. But you took everybody else's testimony, other than this one we are talking about? A. Yes.

Redirect Examination

Q. (By Mr. Goodwin) You took the testimony of every witness who appeared on those days? A. I took every witness who appeared on these days.

Q. You would have no way of knowing, unless you were assigned to come here on a certain day, whether there was testimony taken on other days or not? A. I do not know, no.

Mr. Goodwin: No further questions.

The Court: All right.

Mr. Goodwin: The Government rests.

Mr. Gotkin: I have no witnesses, your Honor.

The Court: I am prepared to find no transcript was made of Revenue Agent Murphy's testimony.

Mr. Gotkin: Could I request that the finding include also a finding that the other witnesses before that grand jury, did have their testimony transcribed?

[10] The Court: No, I will make only the finding I am directed to make. They say in the Remand, if the District Court finds, after hearing, the grand jury testimony of Murphy was not taken, judgment affirmed; if it was taken, new trial. It is the only issue before me. I will report this in due course to the Court of Appeals.

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Criminal No.
65-2-C

UNITED STATES OF AMERICA
v.
LEO J. SCHLINSKY

MEMORANDUM
June 28, 1967.

CAFFREY, D.J.

This matter came on for hearing pursuant to the directions contained in the Opinion of the Court of Appeals handed down June 6, 1967, that a hearing be held to determine whether or not the testimony of Revenue Agent Thomas F. Murphy was stenographically recorded during the presentation to the grand jury of the evidence which culminated in the return of the indictment in the instant case.

At the hearing, held this date, the Government called three witnesses. The first witness was Murray Falk, Esq., an attorney now engaged in private practice, who was the Assistant United States Attorney who presented the Schlinsky case to the grand jury. He testified that no reporter was present while Agent Murphy testified before the grand jury. The Government next called Mr. Robert J. Elliott, a partner in the court-reporting firm which at the time in question had a contract with the Department of Justice to provide stenographic service as needed in the course of presentments to the grand jury. Mr. Elliott testified that on the basis of his firm's records, Miss

Ruth G. Chiarino was the only reporter assigned to take testimony during the presentation of the Schlinsky case. Miss Chiarino then testified that she had with her and had examined all stenotype notes taken by her during the presentation of the Schlinsky case to the grand jury and that she did not take, and consequently there is not included in her stenotype notes, any testimony from Agent Murphy.

On the basis of the testimony of the above three witnesses, each of whom I believe, I find that no stenographic record was made of the testimony of Agent Murphy during the presentation of this case to the grand jury.

/s/ ANDREW A. CAFFREY
U. S. District Judge

ORDER

June 30, 1967.

In accordance with Memorandum of the Court dated June 28, 1967, it is

ORDERED:

I find that no stenographic record was made of the testimony of Revenue Agent Thomas F. Murphy during the presentation of this case to the grand jury.

/s/ ANDREW A. CAFFREY
U. S. District Judge

APPENDIX G

[LETTERHEAD — U.S. TREASURY DEPARTMENT]

July 6, 1967

Jerome Gotkin, Esquire
Widett & Kruger
Eighty Federal Street
Boston, Massachusetts 02110

Dear Mr. Gotkin:

This is in response to your recent inquiry regarding the speech I delivered June 8, 1967 at the Practising Law Institute program on "How To Handle Tax Fraud Cases". You asked for the text of the portion of my speech concerning the "two new instructions" to "special agents regarding statements to be made by them to taxpayers under investigation".

In my speech I stated that "at the outset of his initial interview with the subject of an investigation, a Special Agent of the Intelligence Division will produce his authorized credentials and state: 'As a Special Agent, I have the function of investigating the possibility of criminal tax fraud.' Thereafter, should the stage be reached where the possibility of criminal tax fraud has been sufficiently indicated to warrant a full scale investigation, the Special Agent must advise the subject on contact of his constitutional rights to remain silent and to retain counsel." You may quote from my speech.

Sincerely yours,
/s/ LESTER R. URETZ
LESTER R. URETZ
Chief Counsel

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 436

LEO J. SCHLINSKY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

A jury convicted petitioner of wilfully attempting to evade his income taxes for 1958, 1959 and 1960, in violation of Section 7201 of the Internal Revenue Code of 1954. He was sentenced to five months imprisonment and a $25,000 fine (R. 426–427).

The evidence showed that petitioner's tax returns omitted receipts from a drug and liquor store (R. 117, 338–339) and interest on savings accounts (R. 336–338, 434). It was stipulated, subject to reversal of the district court's denial of a motion to suppress, that the taxable income of petitioner was understated in the amount of $10,660.03 on the 1958 return, $13,881.34 on the 1959 return and $12,510.45 on the 1960 return (R. 89, 433–435).

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Each week petitioner orally gave his bookkeeper a figure, purporting to be the receipts of the store for the preceding week, which the bookkeeper recorded in the books from which the returns were prepared (R. 95, 96). The bookkeeper believed that this represented the store's total receipts for the week (R. 109). Petitioner testified, however, that he did not give the bookkeeper the total weekly receipts, but only those attributable to profitable or "regular" sales. "Convenience" sales at little or no profit were not included in the figure given the bookkeeper, although the cost of the goods so sold were included in petitioner's calculations of his taxable income (R. 335–338).

Prior to trial petitioner moved for suppression of evidence on the ground that Treasury agents investigating the case had obtained such evidence in violation of his rights under the Fourth, Fifth and Sixth Amendments to the Constitution (R. 6–10). After an evidentiary hearing the district court made findings of fact that may be summarized as follows (R. 77–80):

On September 11, 1961, Revenue Agent Thomas Murphy, who had been assigned to audit petitioner's tax returns for the years 1958, 1959 and 1960, by telephone made an appointment to meet petitioner in his drug store the following day. They met there and discussed the nature of the books and records maintained by petitioner, who granted Murphy permission to examine them. Murphy did not warn petitioner of his rights; the investigation at the time was wholly civil in character. During the next two months, Mur-

phy determined that an understatement of income had occurred.

Murphy then referred the matter to the Intelligence Division for further investigation. Special Agents Kirby and Manning first met petitioner at his drug store on April 24, 1962. Kirby told petitioner that he and Manning would conduct a preliminary investigation of petitioner's tax liabilities. Kirby advised petitioner that he did not have to produce any records or make any statement that he felt would incriminate him in any way, and also stated that he and Agent Manning would leave at any time petitioner told them to do so. Petitioner was not told that the investigation then looked toward the possibility of criminal action. Nor was he advised of his right to counsel. Petitioner made certain oral statements to the agents and turned over certain records to them. About two weeks later Kirby made a second visit to the drug store at which time he requested and received some additional records, which were returned to petitioner a few weeks later. Kirby's third and final visit was in February, 1964, when petitioner advised him that he never drew business checks on his personal account.

On the basis of these facts the district court denied the motion to suppress evidence that Kirby and Manning collected, holding that (R. 80):

> * * * no rights of defendant Schlinsky were violated, under the decision of the Supreme Court in *Miranda* v. *Arizona,* 384 U.S. 436 (1966) or *Escobedo* v. *Illinois,* 378 U.S. 478 (1964), it being clear that the defendant was at no time when interviewed at his own store in

> custody or otherwise deprived of his freedom in any significant way. The record establishes that he was never interviewed by the agents except in the familiar surroundings of his own store, and I rule that he acted voluntarily in all of his dealings with the agents, free from any of the compulsive factors adverted to in the *Miranda* opinion. The teaching of both *Miranda* and *Escobedo* is inapplicable to this fact situation. * * *

The court of appeals affirmed.

No error has been committed. No further review of petitioner's conviction is justified.

1. The courts of appeals in six other circuits have been confronted with the same contention made here (Pet. 9–13)—that the Sixth Amendment requires a Special Agent of the Internal Revenue Service to advise a taxpayer of his right to counsel before discussing the taxpayer's returns and books, even when the taxpayer is not in custody or under any restraint, and is interviewed on his own premises. The circuits have without exception ruled in accordance with the decision below. See *United States* v. *Mancuso* (C.A. 4), decided May 19, 1967, 19 A.F.T.R. 2d 1583; *Thomas* v. *United States*, 370 F. 2d 96 (C.A. 5), certiorari denied, 386 U.S. 975;[1] *United States* v. *Maius* (C.A. 6), decided June 15, 1967, 19 A.F.T.R. 2d 1712, petition for certiorari pending, No. 372 this Term;

[1] Although this issue is not discussed in the Fifth Circuit's *per curiam* opinion, it is evident from Mr. Justice Douglas' dissent from the denial of certiorari in *Thomas* that the question was raised in the case. Cf. *Evans* v. *United States*, 377 F. 2d 535 (C.A. 5).

United States v. *Mansfield* (C.A. 7), decided July 26, 1967, 20 A.F.T.R. 2d 5233; *Frohmann* v. *United States,* 20 A.F.T.R. 2d 5244 (C.A. 8); *Kohatsu* v. *United States,* 351 F. 2d 898 (C.A. 9), certiorari denied, 384 U.S. 1011; *Rickey* v. *United States,* 360 F. 2d 32 (C.A. 9), certiorari denied, 385 U.S. 835.[2] This result is correct where, as here, there is not the slightest evidence, nor indeed any claim of, the sort of compulsion that the rule of *Miranda* and *Escobedo* is designed to prevent.

2. Equally without merit is the contention (Pet. 13–15) that, quite aside from *Miranda,* the agents violated petitioner's rights under the Fourth and Fifth Amendments by failing to advise him that he was the subject of a criminal investigation. No such warning is necessary in the circumstances presented here. *United States* v. *Sclafani,* 265 F. 2d 408, 414–415 (C.A. 2), certiorari denied, 360 U.S. 918; *Turner* v. *United States,* 222 F. 2d 926, 931 (C.A. 4), certi-

[2] *United States* v. *Schoenburg*, 19 A.F.T.R. 2d 347 (D. Ariz.), *United States* v. *Kingry*, 19 A.F.T.R. 2d 762 (N.D. Fla.), and *United States* v. *Turzynski* (N.D. Ill.), decided June 2, 1967, 20 A.F.T.R. 2d 5004, on which petitioner relies (Pet. 10), have each been overruled by a court of appeals decision in the same circuit. The weight of district court opinions is in accord with the views expressed in the courts of appeals. See *United States* v. *Gleason*, 265 F. Supp. 880 (S.D.N.Y.); *United States* v. *Fiore*, 258 F. Supp. 435, 440 (W.D. Pa.); *United States* v. *Hill*, 260 F. Supp. 139 (S.D. Cal.); *United States* v. *Carlson*, 260 F. Supp. 423 (E.D.N.Y.); *Moon* v. *Brennan* (E.D. Wis.), decided November 21, 1966, 19 A.F.T.R. 2d 641; *Stern* v *Robinson*, 262 F. Supp. 13 (W.D. Tenn.); *United States* v. *Bachman*, 267 F. Supp. 593 (W.D. Pa.); *United States* v. *Neves* (S.D.N.Y.), decided April 28, 1967, 67–1 USTC, par. 9412.

orari denied, 350 U.S. 831; *United States* v. *Frank*, 245 F. 2d 284, 285–286 (C.A. 3), certiorari denied, 355 U.S. 819; *Montgomery* v. *United States*, 203 F. 2d 887, 892–893 (C.A. 5); *Hanson* v. *United States*, 186 F. 2d 61, 64–65 (C.A. 8); cf. *Lewis* v. *United States*, 385 U.S. 206, 209–211; *Hoffa* v. *United States*, 385 U.S. 293, 300–303.

3. Petitioner's final argument (Pet. 15–17) is that he was deprived of due process of law because Revenue Agent Murphy's grand jury testimony was not recorded and hence was unavailable for use in cross-examination at the trial. It is without substance. Rule 6(d) of the Federal Rules of Criminal Procedure, which authorizes the presence of a stenographer in the grand jury room for the purpose of taking evidence, is permissive and not mandatory. *United States* v. *Caruso*, 358 F. 2d 184, 186 (C.A. 2), certiorari denied, 385 U.S. 862; *United States* v. *Cianchetti*, 315 F. 2d 584, 591 (C.A. 2); *United States* v. *Martel*, 17 F.R.D. 326, 329 (N.D.N.Y.), appeal dismissed *sub nom. United States* v. *Caiola*, 222 F. 2d 369 (C.A. 2). A defendant has no constitutional or statutory right requiring that a stenographer take or transcribe the testimony of a witness before the grand jury. *United States* v. *Hensley*, 374 F. 2d 341, 352 (C.A. 6); *United States* v. *Cianchetti*, *supra*, p. 591; *McCaffrey* v. *United States*, 372 F. 2d 482, 484 (C.A. 10), certiorari denied, June 5, 1967, No. 1322, October Term, 1966; *United States* v. *Westmoreland*, 41 F.R.D. 419, 422 n. 2 (S.D. Ind.); *United States* v. *Martel*, *supra* at 329.

It is true, as petitioner contends, that one error found in *Lenske* v. *United States*, 18 A.F.T.R. 2d

5815 (C.A. 9), was the prosecutor's failure to have transcribed the grand jury testimony of government agents. But the reversal there is based on several other grounds, and there is no indication that the failure to transcribe alone would have resulted in reversal.

There is, moreover, a material difference between the facts here and what the Ninth Circuit found to be the case in *Lenske*,[3] and this distinction as well shows that the failure to record Murphy's grand jury testimony could not have harmed petitioner. In *Lenske* the Ninth Circuit concluded that "the Government so arranged matters that * * * there would be no writing which the taxpayer might use for cross-examination." 18 A.F.T.R. 2d at 5822. Here the reason for not recording grand jury testimony was that Murphy submitted such detailed reports and work papers that recordation was unnecessary. The defense had available to it Murphy's entire "referral" report for use in cross-examination (R. 121–122).[4] When a question arose about a conversation between petitioner

[3] Even were there not this controlling distinction, it is not at all clear that a conflict with *Lenske* would exist; the Ninth Circuit has yet to act on a petition for rehearing *en banc* that the government filed on November 23, 1966.

[4] The court advised defense counsel that only the first two pages related to Murphy's direct examination but that he could read the balance of the report that evening and recall Murphy in the morning for additional cross-examination (R. 122). On the following morning the defense did not exercise its right to conduct further cross-examination (R. 148, 149).

Murphy's "final" report was not made available to the defense since the court found that nothing contained in it related to his testimony on direct examination (R. 135–136). See 18 U.S.C. 3500(c).

and Murphy on September 12, 1961, Murphy produced for the use of defense counsel a page from his work papers concerning that conversation (R. 136–137). When there arose the question of the time Murphy spent on this investigation during September, October and November, 1961, the witness produced his monthly reports and read into the record the precise days he had worked on this case and the number of hours spent on it each day (R. 132–133). Thus the defense had available to it such detailed and extensive records of Murphy's activities that the lack of a transcript of his grand jury testimony could not have been prejudicial.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 436

LEO J. SCHLINSKY,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR PETITIONER IN REPLY

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MEMORANDUM FOR PETITIONER IN REPLY

The Government concedes that one error found in *Lenske* v. *United States*, 18 AFTR 2d 5815 (C.A. 9), was the Government's "clever scheme" of recording only the grand jury testimony of those witnesses who were not Government agents, and of making no record of the agents' grand jury testimony.[1] But the Government attempts to avoid

[1] This is a situation which, to our knowledge, has not previously been presented to this Court, since such earlier cases as there have been involved situations in which no grand jury testimony at all was recorded.

the impact of *Lenske,* and the conflict between it and the First Circuit's decision below, by claiming that there is "a material difference between the facts here and what the Ninth Circuit found to be the case in *Lenske*" (Gov. Mem. 7).[2]

The Government's claim that there is "a material difference" of fact between this case and *Lenske* is wholly without merit and is based on an out-of-context quotation from *Lenske* and on a contorted reading of the record herein.

The Government states that in *Lenske* the Ninth Circuit concluded that " 'the Government so arranged matters that ... there would be no writing which the taxpayer might use for cross-examination' ", and then argues that this case is different because here petitioner did have "writings" available for cross-examination, namely, a referral report and certain other records of Revenue Agent Murphy (the key Government witness whose grand jury testimony was not recorded) (Gov. Mem. 7). The missing "writing" to which the Ninth Circuit was referring in *Lenske,* however, was not any of the Special Agent's reports or records, but his grand jury testimony. The full statement of the Ninth Circuit, from which the Government took the portion quoted in its memorandum, speaks for itself (67-2 USTC ¶9631, at 85,105):

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[2] The Government also suggests that this Court deny the petition herein because "the Ninth Circuit has yet to act on a petition for rehearing *en banc* that the government filed" (Gov. Mem. 7, n. 3). That motion was denied on August 28, 1967, and on the same day, the Ninth Circuit withdrew its earlier opinion (reported at 18 AFTR 2d 5815) and rendered a new opinion (reported at 67-2 USTC ¶9631). The new opinion, while stating that it was not necessary to decide whether the Government's "clever scheme" would alone have constituted ground for reversal, restated word for word its earlier finding that the Government had acted unfairly and that the incident was "particularly offensive" (compare 18 AFTR 2d at 5822 and 67-2 USTC ¶9631 at 85,104 - 85,105).

> Whether government counsel meant that no shorthand notes had been made of the Special Agent's Grand Jury testimony, or that such notes were taken and had not been typed up, it is evident that the Government so arranged matters that there would be available transcripts by which neutral witnesses could be held to their Grand Jury testimony and checked if they varied from it, while as to government partisan witnesses, who presented no danger of their being swayed from their recitals, there would be no writing which the taxpayer might use for cross-examination. It was a clever scheme, but one-sided and unfair, and in complete violation of the teachings of *Holland* v. *United States, supra.*

Furthermore, the defendant in *Lenske* had many other "writings" of the Special Agent available to him for cross-examination. He not only had "all memoranda and statements made by the Special Agent," but also (except for certain deletions made by the trial court) the Special Agent's report which consisted of 37 closely typewritten pages, followed by an appendix of 84 pages which listed 468 exhibits, and the names and addresses of 315 prospective witnesses (67-2 USTC ¶9631, at 85,107 - 85,108; this report is also referred to in the Ninth Circuit's earlier opinion, 18 AFTR 2d, at 5815-5816).

It is beyond cavil that the "writing" which was unfairly denied the defendant for cross-examination in *Lenske*—as in this case—was the agent's grand jury testimony.

Lastly, the Government assigns a reason for its failure to record Murphy's grand jury testimony which is not only unsupported, but contradicted, by the record. The Government states (Gov. Mem. 7):

> Here the reason for not recording grand jury testimony was that Murphy submitted such detailed reports and work papers that recordation was unnecessary.

In contrast, the record (which consists of a letter from the United States Attorney, District of Massachusetts, to the First Circuit (Appendix C to petitioner's petition)) states:

> In Footnote 2, page 11, of Appellee's Brief, as well as in oral argument, counsel for the Government stated that it has been a long established policy of the United States Attorney, District of Massachusetts, not to record the Grand Jury testimony of "Government employees."
>
> We believe, upon reflection, that the phrase "Government employees" is a bit too inclusive and apt, therefore, to mislead the Court. The policy, in fact, has been not to record the testimony of Government investigative agents only for the reason that the reports of these agents, which are at all times available to the United States Attorney, normally contain the substance of their testimony before the Grand Jury. Moreover, substantial portions of these reports are available to the defendant under the Jenks Act should the Government agent testify.

See, also, footnote 5 to the First Circuit's opinion below (Appendix A, p. 9a, to petitioner's petition) in which the First Circuit noted the above statement of the United States Attorney "for what little it is worth," and then observed that "the government disclaimed at the trial having any such report from Murphy."

The petition for a writ of certiorari should be granted.

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